

Chron ✓



County of Los Angeles  
**CHIEF ADMINISTRATIVE OFFICE**

713 KENNETH HAHN HALL OF ADMINISTRATION • LOS ANGELES, CALIFORNIA 90012  
 (213) 974-1101  
<http://cao.co.la.ca.us>

DAVID E. JANSSEN  
 Chief Administrative Officer

September 10, 2003

Board of Supervisors  
 GLORIA MOLINA  
 First District

YVONNE BRATHWAITE BURKE  
 Second District

ZEV YAROSLAVSKY  
 Third District

DON KNABE  
 Fourth District

MICHAEL D. ANTONOVICH  
 Fifth District

To: Supervisor Yvonne Brathwaite Burke  
 Supervisor Gloria Molina  
 Supervisor Zev Yaroslavsky  
 Supervisor Don Knabe  
 Supervisor Michael D. Antonovich

From: David E. Janssen  
 Chief Administrative Officer

**COUNTY OF LOS ANGELES LOS ANGELES V. AETNA, EXPERT FEES**

The Chief Administrative Office (CAO) reviewed the expert fees incurred in the matter of the County of Los Angeles Los Angeles v. Aetna Insurance Company, et al. The review included:

- analysis of monthly invoices from Bergman, Wedner & Dacey (Bergman), the firm selected by County Counsel to act as plaintiff legal counsel for the County of Los Angeles (County)
- analysis of monthly invoices from Black and Veatch and Widom Wein Cohen O'Leary Terasawa, two firms retained by Bergman as engineering consultants and experts
- interviews with County Counsel staff
- interview with Gary Greenfield, Litigation Cost Management (LCM), firm retained by County Counsel to analyze the lawsuit's expert expenses
- interview with Robert Mason of Bergman, partner assigned a primary responsibility to assure accurate and timely Bergman and expert invoices
- correspondence to Bergman from County Counsel addressing problems arising from Bergman invoice control and the administration of Bergman and experts' expenses

Each Supervisor  
September 10, 2003  
Page 2

- review of County Counsel's various agreements controlling Bergman and expert/consultant billing practice
- review of the County of Los Angeles Auditor-Controller's April 24, 2003, report *Expert Witness Invoices*; and, subsequent, discussion of that report with Auditor-Controller staff

### ISSUE

The cost of experts retained for this lawsuit is higher than originally anticipated focusing concern about County Counsel's administration of its expert expense. Accordingly, CAO staff concentrated its review upon County Counsel's:

- review and processing of Bergman and expert invoices
- fiscal and budgetary controls

### SUMMARY OF FINDINGS

- The responsibility of managing the billing process of a lawsuit that generates \$35.0 million in legal and expert expense is a massive undertaking.

County Counsel's processes would have been strengthened if County Counsel had purchased and utilized litigation and expert fee tracking software.

- The scope and amount of work necessary to assure compliance with County Counsel's budget and billing guidelines does not appear to have been clearly understood at the lawsuit's outset. County Counsel repeatedly directed Bergman to strengthen the firm's invoice control process.

Bergman was contractually responsible for selecting the lawsuit's experts and to maintain billing standards. Bergman did not assure experts compliance with Bergman and County Counsel's billing guidelines.

- CAO staff found no evidence that County Counsel authorized payment of legal or expert expense from invoice summaries.
- For tactical reasons, prior to and during trial, County Counsel did not overly stress expert's strict adherence to County Counsel's billing guidelines.
- Should the two remaining Aetna related lawsuits be withdrawn, CAO staff recommends an immediate and thorough review of the expert fees and expenses.

Each Supervisor  
September 10, 2003  
Page 3

- County Counsel's current expert billing guidelines are thorough, appropriate and should be aggressively maintained and enforced by County Counsel and assigned outside Counsel from the outset of all future legal matters.

### INVOICE REVIEW AND PROCESSING

Experts retained by Bergman were required to provide Bergman with monthly invoices of their fees and expenses. In turn, Bergman was responsible for reviewing and approving the experts' expense and attaching those invoices to Bergman's monthly invoice. County Counsel required Greg Bergman, Bergman's lead counsel, to attest to the appropriateness of all invoices when Bergman submitted its monthly invoices. The statement is, "I have personally examined this billing statement. All entities are in accordance with the Agreement for Professional Legal Services, are correct and reasonable for the services performed and costs incurred, and no item on this statement has been previously billed to County." This statement primarily affirms the accuracy of Bergman's invoices; however, the Bergman-County Professional Services agreement requires Bergman's review and approval of the invoices produced by the experts retained by Bergman prior to Bergman's submission to County Counsel for payment.

County Counsel's rules concerning the invoices generated by outside legal counsel are found in the *AGREEMENT BY AND BETWEEN THE COUNTY OF LOS ANGELES AND BERGMAN, WEDNER & DACEY, INC. FOR PROFESSIONAL LEGAL SERVICES. Sections IV and V.* That document states,

"FIRM shall obtain COUNTY'S written approval before retaining any consultant or expert witness to assist with any COUNTY assigned case."

"Billing rates may be subject to periodic reviews and adjustment as agreed between COUNTY and FIRM. Any rate increase shall require an amendment to this AGREEMENT."

County Counsel's rules concerning the invoices generated by experts are contained in County Counsel's *REVISED COUNTY COUNSEL BILLING REQUIREMENTS FOR LEGAL AND EXPERT INVOICES.* That document states,

"Invoices for legal and expert services must comply with these requirements."

"All services must be billed in one-tenth hour or smaller increments. Invoices in which services are billed in quarter-hour, half-hour, or hour increments will be rejected."

Each Supervisor  
September 10, 2003  
Page 4

"Any experts retained by contract counsel must comply with all County Counsel billing requirements. County will not reimburse nor approve billings which do not comply with these requirements. It is contract counsel's responsibility to see that retained experts and third party vendors are aware of and meet these requirements."

County Counsel's own invoice control procedure requires multiple reviews and approvals. CAO staff identified no deviation by County Counsel staff of this requirement. **The invoices reviewed by CAO staff were all individually processed by a County Counsel administrative employee** trained to identify discrepancies between the actual invoices and County Counsel billing practice as authorized under County Counsel's professional services agreement. Thereafter, the assigned County Counsel attorney and manager conducted reviews and authorized payment based upon their authority levels. Any identified Bergman billing discrepancy was communicated to Bergman, and as a result, Bergman's payments were reduced.

**CAO staff found no evidence that County Counsel authorized payment of legal or expert expense from invoice summaries.**

County Counsel identified legal and expert billing discrepancies and/or disallowances were:

- denial of peer reviews
- copy/reproduction charges
- mid-term agreement rate charges
- submission of late invoices
- failure to properly itemize a day's work
- failure to bill in 1/10<sup>th</sup> hour increments
- missing expert bills
- individuals not listed in agreements
- inappropriate review of reports
- court reporter fees
- potential duplicate billings
- scope of expert work overlapping
- deleted or reduced mileage, meals, travel, taxi, parking, phone, room rates
- repeat entries
- inconsistency of billing practice between experts (one firm initially billed by building by month, rather than chronologically for all buildings on a monthly basis)
- invalid invoice calculations; for example, one entry read, "19 X \$155.00 = \$2,945.00"; however, County Counsel deducted \$190.00 because the hourly rate should have been \$145, not \$155

Each Supervisor  
September 10, 2003  
Page 5

Additionally, CAO research reveals that at times, during the lawsuit's six years, individual attorneys and experts and their rates were appropriately added and deleted from numerous agreements; for example, Bergman added a number of Associates and a Data Control Clerk with fixed rates, and Vinson & Demetrious (consultant) appropriately added five professionals to its list and table of experts. However, this practice was not consistently maintained by the experts retained by Bergman.

While County Counsel exerted much effort and energy to appropriately process Bergman payments in accordance with County Counsel guidelines, **CAO staff believes County Counsel should have purchased and utilized professional service fee and expense tracking software.** Although such software requires manual entry of all items listed on each invoice, once the data are entered the resulting relational database could have been utilized by County Counsel to assist the processing of numerous and voluminous invoices. Such software is similar to the proprietary software utilized by Litigation Cost Management (LCM), the litigation bill review firm retained by County Counsel to analyze experts' billing compliance. The alternative to County Counsel's purchase of invoice control software would have been the retention, at the lawsuit's outset, of the services of an outside firm (like LCM) to assist with the review, analysis and control of the lawsuit's expert expense.

In support of the lawsuit's litigation management plan, Bergman retained the services of 21 expert firms, of which six were engineering firms. Common deficiencies were consistently noted by County Counsel in the experts' invoices:

- failure to bill in 1/10<sup>th</sup> of an hour increments, most billings were in whole hour increments (Bergman staff informed CAO staff the whole hour increments were appropriate because Bergman confirmed that the experts had worked an entire hour and not rounded up)
- inadequate description of services
- the billing of specific experts' services whose names and rates were not included in the firm's agreement

The latest version of County Counsel's *REVISED COUNTY COUNSEL BILLING REQUIREMENTS FOR LEGAL AND EXPERT INVOICES* is an appropriate and thorough document. Most public entities and public entity pools throughout the United States do not utilize such an extensive agreement and guidelines. However, because of its uniqueness, County Counsel clearly was forced to continually direct Bergman to assure the experts' compliance with County Counsel's billing guidelines.

Additionally, due to County Counsel's resource allocation, the attorneys assigned to the lawsuit were responsible for both invoice control and the lawsuit's management. Therefore, during specific phases of the lawsuit, at times, bill review could not have

Each Supervisor  
September 10, 2003  
Page 6

been as intense. Specific phases of the lawsuit required intense managerial control; for example, trial preparation rather than bill control.

### **BERGMAN, WEDNER & DACEY**

There is evidence that County Counsel staff worked throughout the lawsuit to assure experts' billing compliance. **CAO staff did not discover similar evidence that Bergman worked as diligently prior to submitting a month's invoices to County Counsel.** However, Bergman staff informed CAO staff that each month's set of invoices received at least three levels of review by Bergman; and, that Bergman returned numerous invoices to the experts for reprocessing.

CAO staff noted numerous pieces of correspondence to Bergman from County Counsel directing Bergman to communicate the County Counsel's billing guidelines to the experts. Additionally, Bergman informed CAO staff that they repeatedly communicated to experts that County Counsel's expert billing guidelines must be followed; yet, CAO staff did not identify any experts' monthly billings reduced by Bergman. Such reductions may exist; however, they were not identified during CAO staff's review.

At times, without prior County Counsel approval, experts changed their rates. Although the new rates appear consistent with those charged by other experts, to assure full compliance with its own guidelines, County Counsel found itself repeatedly communicating with Bergman about the necessity of County Counsel's pre-approval of billing rate changes.

One of Bergman's roles was to assure the experts billed according to County Counsel guidelines. Accordingly, CAO staff noted that rather than communicating directly with the experts themselves, County Counsel staff repeatedly communicated with Bergman. Bergman stressed to CAO staff that Bergman performed its role as billing coordinator without "billing the County." Realistically, Bergman rates, likely, included the cost of meeting this responsibility. Bergman states they did not purchase and maintain expert expense tracking software.

### **LITIGATION COST MANAGEMENT**

County Counsel states it reduced the lawsuit's invoices by approximately \$567,016. In its first three of four reports, Litigation Cost Management (LCM) identified an additional \$212,267 in potential deductions; however, \$121,638, 57.3%, were not specifically identified billing discrepancies; rather a suggestion by LCM to reduce the experts' fees by an additional 5.0% for "failure to comply with County Guidelines."

Each Supervisor  
September 10, 2003  
Page 7

As noted in LCM's first three reports, LCM identified \$90,629 in questionable expert billing entries:

- mid-term rate adjustments
- conferences with no corresponding entry
- disparity in billing for conferences
- possible billing of secretarial/clerical expense
- possible billing of administrative expense
- double billing
- missing descriptions (of work)
- greater than 24-hour days

During his interview with CAO staff, LCM's Gary Greenfield confirmed the above questionable entries may ultimately possess legitimate explanations. For example, the disparity in billing for a conference could be due to one expert departing a meeting earlier than another expert. Should the County decide to withdraw its two remaining, Aetna related lawsuits, **CAO staff recommends an immediate and thorough review of all experts' bills.** In addition to repayment of questionable entries, CAO staff also agrees with LCM's recommendation for the County Counsel to request additional payment from its experts to reimburse County Counsel's unnecessary administrative expense incurred because of an expert's lack of billing compliance. Unfortunately, the right to an automatic 5% return of fees is not a part of the County Counsel's expert/consulting agreement and guidelines.

### TRIAL CONCERN

For tactical reasons, County Counsel decided not to overly stress experts' strict adherence to County Counsel billing requirements. The decision was based upon the belief that experts' full cooperation was necessary through trial; and, that strict adherence of, or imposing penalties for failure to adhere to, County Counsel's billing guidelines could damage the critical relationship between the experts and the County. Accordingly, County Counsel staff informed CAO staff of **County Counsel's intent to perform a thorough post trial accounting of expert fees and expenses.**

Unfortunately, a post trial accounting will be difficult because:

- many questionable entries were made years ago, and some, likely, by experts no longer employed by the original firm
- CAO staff noted numerous invoice entries that did not clearly describe the experts work

Each Supervisor  
September 10, 2003  
Page 8

- County Counsel will be requiring experts to adhere to guidelines and standards, typically, not maintained by other public entities
- Because of the jury's recent verdict, the intent of County Counsel's post trial review must be clearly and consistently stated by County Counsel. County Counsel must strive to reduce or eliminate the impression County Counsel is attempting to arbitrarily recapture expenses. County Counsel should stress it waited for the most appropriate time to conduct its bill review.

### **FISCAL AND BUDGET CONTROL**

Except in highly complex legal matters, it is rare that a lawsuit's expert fees exceed its attorney fees. Despite County Counsel's effort to manage expert fees and expenses, those expenses continually exceeded budget projections. What contributed to the repeated budget overruns? The causes identified by CAO staff are:

- Litigation of this size and scope is unusual. Even a public entity the size of the County of Los Angeles rarely initiates legal action, the cost of which approached \$35.0 million.
- Given the scope of the litigation, County Counsel found it difficult to accurately predict at the lawsuit's outset what its expenses would be.
- Bergman recognized the difficulty of coordinating its experts and retained a firm, Johnson Belt, to strengthen that effort. CAO staff was informed Johnson Belt prepared the initial expert budget and scopes of work for Bergman, but had no role in invoice review. Yet, CAO staff found no evidence that Johnson Belt assisted Bergman in developing revised budgets, or in obtaining experts compliance with County Counsel billing guidelines.
- The difficulty of budget preparation and control was compounded by the timeliness problem of experts' billings. CAO staff noted instances of delays of up to three months between the time the experts work was performed and the invoices to pay for the work was received.
- The lawsuit's discovery referee required the County to repeatedly add to the evidence generated by the experts work product. By one estimate, the discovery referee's decisions, at a minimum, doubled the lawsuit's expert expense.

Each Supervisor  
September 10, 2003  
Page 9

### SUMMARY AND RECOMMENDATIONS

The County of Los Angeles v. Aetna Insurance Company lawsuit was filed in 1997; its jury trial began in February 2003, and concluded in September 2003. During the nearly six years necessary to bring the matter through trial, the lawsuit's expert fees and expense budgets were repeatedly exceeded. The responsibility of managing the billing process of a lawsuit that generates \$35.0 million in legal and expert expense is a massive undertaking. The lawsuit's scope and amount of work necessary to assure compliance with County Counsel's own budget and billing guidelines does not appear to have been clearly understood at the lawsuit's outset.

However, during the lawsuit's term, County Counsel recognized the need for assistance. Therefore, County Counsel:

- Arranged for a legal billing expert, LCM, to review County Counsel's billing controls and experts compliance with those controls; however, County Counsel tactically delayed full compliance with its billing guidelines.
- Repeatedly directed Bergman to strengthen the firm's invoice control processes; however, billing problems continued.
- Approved the engagement of a supervising expert firm, Johnson Belt, by Bergman; however, Johnson Belt did not provide continued support of Bergman's budget and invoice control effort.
- Assigned administrative staff to perform reviews of expert expenses for compliance with County Counsel billing guidelines; but, County Counsel did not provide staff with fee and expense tracking software.

Regardless of whether or not the County continues prosecution of the two remaining lawsuits, CAO staff recommends:

1. Receipt of LCM's fourth report be expedited.
2. County Counsel's expert billing guidelines are thorough, appropriate and should be aggressively maintained and enforced by County Counsel and assigned outside Counsel from the outset of all future legal matters.
3. County Counsel staff should research the market place for expert expense tracking software and utilize such software as appropriate.

Each Supervisor  
September 10, 2003  
Page 10

4. Lessons learned from this case about invoice control and management of experts be applied to other legal matters.

Should the County decide not to continue prosecution of the remaining two lawsuits:

1. Any billing discrepancies identified in LCM's fourth report will, likely, be similar to those identified in LCM's first three reports; however, the discrepancies identified in all four reports should immediately be addressed with Bergman and the expert firms. Sufficient staff should be assigned this task. The staff should possess the necessary skills to expedite invoice review and obtain reimbursement.
2. To assist County Counsel obtain reimbursement, Bergman staff should become actively engaged in the analysis and recovery of previously paid but inappropriate expert expense. Bergman should immediately initiate a practice of returning to the experts any invoice out of compliance.
3. Pursue recovery of an additional 5% of paid expert bills. Even if the effort is unsuccessful, the request may instill a heightened sense of cooperation by the experts when questioned about their past billing practice.

Please call me, or Rocky Armfield of my staff at (213) 351-5346, if you have any questions.

DEJ:SRH  
RAA:mtm

c: Lloyd W. Pellman, County Counsel  
J. Tyler McCauley, Auditor-Controller